

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 28706/2018

DATE: 2019-08-30

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: no

**(2) OF INTEREST TO OTHER JUDGES:
NO.**

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(3) REVISED.

IN THE MATTER BETWEEN:

SUID-AFRIKAANSE ONDERWYSUNIE

PLAINTIFF

AND

MICHAEL PASHUT

DEFENDANT / EXCIPIENT

J U D G M E N T

Klein, A.J.

[1] The Plaintiff seeks a dismissal of exceptions lodged by the Defendant.

[2] The background information to this application can be summarized as follows:

2.1. The Plaintiff sued the Defendant for defamation on 24 April 2018 by way of a combined summons.

2.2. The Defendant served a Notice of intention to defend on 16 May 2018.

2.3. A notice of Bar was served on 26 June 2018.

2.4. A substantial amendment to the Particulars of Claim was served. The Defendant served a notice in terms of rule 23(1) contending that the amendment dated 28 August was vague and embarrassing, alternatively do not disclose a proper cause of action. "Amended pages to the Amended Particulars of Claim" was filed. Another notice of exception was filed on the basis that they are vague and embarrassing the averments do not disclose a proper cause of action.

2.5. On 11 December 2018 the notice of exception which was lodged raised eight exceptions, it is found on pages 91 to 102 of the bundle and is the one this Court will deal with together with the Amended Particulars of Claim at pages 4 to 67 of the bundle.

2.6. The 11 December 2018 Notice in terms of rule 23(1) contends that the amended Particulars of Plea as found at pages 4 to 67 do not disclose a proper cause of action.

[3] This Court will therefor only deal with an exception to a pleading based on the contention, namely that the pleading lacks averments which are necessary to sustain an action. An exception to a pleading may be based on either or both of the following

two contentions, namely that the pleading: is vague and embarrassing, or lacks averments which are necessary to sustain an action or a defence.

[4] The differences between the two types of exception are of substance and form. Where a pleading falls into either of these categories the opposing party may deliver an exception to it. An exception implies that the pleading objected to, taken as it stands, is legally invalid for its purpose.

[5] The object of excepting to a pleading or to part of a pleading is to obtain a substantive order setting the pleading aside either in whole or in part and not to obtain a mere expression of opinion from the court on the legal point raised by the exception.¹

[6] Generally speaking, exceptions serve as a means of objecting to pleadings which are not sufficiently detailed, lack lucidity, or are incomplete, and are thus embarrassing, affecting the ability of the other party to plead thereto.²

[7] An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit.³

[8] If evidence can be led which can disclose a cause of action or defence alleged in a pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defence. This means that the pleading must foreshadow the evidence.⁴

¹ *Barclays National Bank Ltd v Thompson* 1989 (1) SA 547 (A) 553.

² *Bowman Gilfillan Inc and Another, In re: Minister of Transport and Others* [2018] 3 All SA 484 (GP).

³ *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2006 (1) SA 461 (SCA) par 3.

⁴ *Vermeulen v Goose Valley Investments (Pty) Ltd* 2001 (3) SA 986 (SCA) 997.

[9] Causes of action are not in the first instance dependent on questions of law. They require the application of legal principle to a particular factual matrix. The test on exception is whether on all possible readings of the facts no cause of action is made out.⁵

[10] It is for the excipient to satisfy the Court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts.⁶

[11] Unless an exception is taken for the purpose of raising a substantive question of law, which may have the effect of settling the dispute between the parties, an excipient should make out a very clear case in order to succeed.⁷

[12] Exceptions are generally not the appropriate procedure to settle questions of interpretation. The same applies to the pleading of implied (strictly tacit) terms; the test on exception is whether the trial court could (not "should") reasonably imply the term alleged.⁸

[13] So, too, questions of vagueness.⁹

[14] The dismissal of an exception is not appealable nor cross-appealable.¹⁰

⁵ *Astral Operations Ltd v Nambitha Distributors (Pty) Ltd; Astral Operations Ltd v O'Farrell NO and Others* [2013] 4 All SA 598 (KZD).

⁶ *Trustees for the time being of the Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others (Legal Resources Centre as Amicus Curiae)* [2013] 1 All SA 648 (SCA) at [36].

⁷ *Francis v Sharp* 2004 (3) SA 230 (C)

⁸ *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* 1991 (1) SA 508 (A)

⁹ *Picbel Groep Voorsorgfonds v Somerville* [2013] 2 All SA 692 (SCA).

¹⁰ *Itzikowitz v Absa Bank Ltd* 2016 (4) SA 432 (SCA), par 21

[15] The excipient must show that the appellant's claim is (not may be) bad in law. The excipient must show that the claim does not bear the meaning contended for by the plaintiff.¹¹

[16] The excipient must persuade the court that upon every reasonable interpretation of the averments, no cause of action is established thereby.¹²

[17] We are dealing with exceptions to a defamation suit. In the case of an exception as to whether alleged words are defamatory, the test is whether, objectively speaking, a reasonable person of ordinary intelligence might reasonably understand the words to convey a meaning defamatory of the plaintiff.¹³

[18] In this case, the Plaintiff passes the first test.

[19] In *Crots v Pretorius* [2011] 3 All SA 10 (SCA) the Court considered three problems to a defamation claim, when it said:¹⁴

"The respondent's counterclaim for defamation was granted in the amount of R20 000. There are three problems with this conclusion. First, the respondent did not plead to whom the defamation was published, second it was never put to the appellant who the third parties were that publication was allegedly made to and third the evidence tendered does not establish the cause of action."

[20] The publishing was an issue. In the case before the court it is not an issue, there was publishing and people and/or establishments are mentioned.

[21] In *Crots v Pretorius* [2011] 3 All SA 10 (SCA) the Court said at par 15 that "Publication is an essential requirement of defamation that must be pleaded and proved." There must therefore be an expectation of a publication to identifiable

¹¹ *Belet Cellular v MTN Service Provider* (936/2013) [2014] ZASCA 181 (24 November 2014) at [5].

¹² *Gillyfrost 54 (Pty) Ltd v Nelson Mandela Bay Metropolitan Municipality* [2015] 4 All SA 58 (ECP).

¹³ *Argus Printing & Publishing Co Ltd v Esselen's Estate* 1994 (2) SA 1 (A) 20.

¹⁴ Par 14

people or establishments. In Crots the court had already heard evidence and therefore should not be confused with an exception where no discovery has taken place and no witnesses called. The Defendant will have ample opportunity to plead based on the names and the institutions mentioned in the Particulars of Claim. This would then be in line with what the court said in Crots that the names of the persons to whom the defamatory remarks were made and who were to be called as witnesses have to be pleaded and disclosed during cross-examination. In other words Crots is already past the pleading stage and that judgment is based upon a full trial.

[22] When looking at exception one, the attack on the annexures. The Court found the following annexures in the papers:

- A, Resolution, page 19
- D1, Constitution, page 20
- A2, Email, page 49
- A3 Pietersburg, page 52
- A4 Magalieskruin, page 55
- A5 Laerskool Hoevelde page 59
- A6 Danielskuil, page 62
- A7 Heyns, page 66

[23] Exceptions numbers two to seven are based on the legal position pertaining to publication. It can be pleaded as such. If evidence can be led which can disclose a cause of action or defence alleged in a pleading, that particular pleading is not excipiable. The exceptions furthermore refer to people who are potential witnesses, as such the specific names of school principles need not have been mentioned, in any event, the Plaintiff, so it seems, rely on documentary evidence to prove its case.

[24] Exception number eight is an exception based on two legal issues, issues that can be pleaded and must be proved together with the legal arguments based on the limited defamation of an association.

[25] The Court, when looking at cost orders, was weighing up whether a punitive cost order should not have been granted against the Defendant as the exceptions are not exceptions that could really have been a serious threat for the Plaintiff, yet Plaintiff had to instruct senior counsel and long arguments flowed from both sides. However, the court will therefore look at the costs of senior counsel.

The Court makes the following order:

1. All exceptions are dismissed.
2. Defendant to pay the costs, including the costs of senior counsel.

A handwritten signature in black ink, appearing to be 'M Klein', with a large, stylized loop at the end.

M Klein

Acting Judge of the High Court of South Africa.